Justin Driver and Heather Gerken EDIT V7 120722_1

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This is Inside Yale Law School, the podcast series designed to give you a peek inside to the scholars, the thinkers, the teachers, and the game changers of Yale Law School. I'm Heather Gerken, the Dean, here to open a little window into the world of this remarkable place.
I think that there is real value in looking at the way that the Constitution assumes a particular form in institutional settings. So that's true for the public school, and I've also written about the prison, where the Constitution, again, assumes a particular form. So we often think, well, does the Constitution protect certain conduct or not protect that conduct? And the answer to that question is often predicated on where the conduct occurs.
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I am so happy to have with me today Justin Driver, the Robert R. Slaughter Professor of Law. Justin, thank you so much for being here.
I'm really glad to be here. Thanks.
If it's all right with you, I'd like to go back to where this all started for you. I wonder if you might talk a little bit about why did you end up doing education law?
Yeah. So I grew up in Washington DC. I grew up in southeast DC, east of the Anacostia River, a predominantly Black neighborhood. My parents never had me go to our neighborhood school, in order to, they believed, have me realize my full potential.
So starting in the fifth grade, I started traveling to way upper northwest Washington. That required me to get on a bus in two different subway lines and have a pretty long walk. And I started thinking, why in the world am I waking up at the crack of dawn in order to go to the fifth grade, and what advantages and opportunities am I gaining, as a result of this long journey? And importantly, what opportunities and advantages are my friends from my neighborhood missing out on, as a result of going to not great schools?
And so that drove home for me the idea that education makes an enormous difference, and the way that law structures education is an understudied phenomenon in our schools. Neither one of my parents graduated from college, but they were incredibly invested in our education. I can still remember being in the sixth grade, and my father departing very late, unusually late, one night, in order to drive across town and to sleep in his car outside of the best public junior high school in Washington DC. And he did this in order to make sure that he could be the first in line, in order to secure permission for students to attend this school that didn't grow up in the district. And that is emblematic of my parents attitude toward education, and I'm so grateful to them.
I'm quite confident you and I wouldn't be having this conversation today but for their superhuman efforts. And I view that as an inspiring story but also a depressing story. It shouldn't be that parents are required to jump through these incredible hoops in order to make sure that their kids can thrive.

So this actually is a perfect lead in to your book, The Schoolhouse Gate, which is an incredibly interesting book, first of all, because you start talking about the personal. Which is not always the move of a scholar, but I think it made that book even more powerful. But what it is, if I can summarize, is an effort to bring together all the education decisions in one place. And I will say that, typically, in con law, you get these in a scattered way, and you don't see the deep connections among them.

And as a scholar of constitutional law, reading them together made me think about that line of cases completely differently. So I wonder if you could just talk about how did the idea for it originate? The subject matter was in your life, but how did you think about how to write that book?

Yeah. I was interested in that book in examining the intersection of two important institutions in American society, the public school on the one hand and the Supreme Court on the other. And the core claim of the book is that it's difficult, if not impossible, to understand the one institution without thinking about the other. That is to say that the Supreme Court really does regulate public schools in a significant way, and that we don't think about public schools as being legal institutions. Law is all around them, and they shape these incredibly significant institutions in American life.

And then I was also interested in thinking about the Supreme Court's role in American life and intervening in debates about what the court can actually do in its capacity. Many of our colleagues in constitutional law have a very jaundiced conception of what the court can do, and I was interested in showing how these education decisions demonstrate the court's counter majoritarian capabilities. Its ability to stand up against dominant views in American society, and the education cases really do offer an unusually good window for examining that phenomenon.

What I loved about that book was that it was an act of scholarly daring, because you were moving against the tide. So the blaze statement about Brown and all of those and the court's role was really to say the court doesn't really matter. And you came back with what seemed like, at first glance, an old fashioned answer, but a quite sophisticated one about the role of the courts. Although, I will say now, in, the wake of Dobbs I'm not sure that anyone needs the lesson that the court and affect people's lives pretty deeply but. That's one of the things I love the most about that book was that it ran against the tide and built out a case for a set of arguments that I think scholars had forgotten or overlooked.

Yeah. I do think that there is real value and looking at the way that the Constitution assumes a particular form in institutional settings. So that's true for the public school, and I've also written about the prison where the Constitution, again, assumes a particular form. And so we often think, well, does the Constitution protect certain conduct or not protect that conduct? And the answer to that question is often predicated on where the conduct occurs.

So it's true, when I told people I was going to write a book about education law, there were some people who were saying, why? That's just not an especially vigorous or invigorated area of the law. That's not a good use of your time. You should be doing something else, and I'm glad that I dedicate at the time to investigate this issue.

Because it does demonstrate lessons that I think have been forgotten. I'm not someone who believes that the court can do whatever it wishes, but I think that there's been an overcorrection, where people suggest that the court is a virtually powerless institution in American society. And for good or for ill, it seems to me that the court possesses a fair amount of power.

The lawyer's lawyer in me also loved the book, because what you realize is that there's this assumption I think sometimes in con law that everything applies across the board, and that you can move from what

lawyers and political theorists would call domain to domain and expect the doctrine to play out. I'm in a place, election law, where that is flatly untrue, but to see it in the school's context was really powerful, to see how differently the doctrine plays out when the court is talking about schools.

Yeah. That's exactly right. The Supreme Court has articulated a whole host of constitutional doctrine that applies, in fact, only within the public school. So student free speech rights, for example, have their own diminished protections. The Supreme Court of the United States famously said, in Tinker versus Des Moines, it can hardly be argued that students shed their constitutional rights at the schoolhouse gate. That gives me the title for my book, The Schoolhouse Gate, but it is true that the students receive what I call junior varsity constitutional rights in the school setting.

And what's true of the freedom of speech is also true about the Fourth Amendment, dealing with searches and seizures. Students receive reduced protections, but they do receive protections, and the same is true with respect to due process, thinking about suspensions. And so it is important to be attuned to the particular form that constitutional rights assume in varied constitutional settings.

So what's really interesting about that quote is that the court says that, and yet the court also understands what we all know, which is students learn to be citizens inside of school. I wonder if you might talk a little bit about your vision for civic education.

Yeah. One of the things that I do here at Yale Law School is I am the mentor to a program that takes Yale law students and has them teach civic education, in New Haven public schools. It's a really wonderful program, and the way that they focus on communicating constitutional rights to students is to talk about the students constitutional rights. I know very well from my own youth that, if we were to talk about the separation of powers and checks and balances and executive power, that would have felt quite foreign and abstract and removed.

But if you had talk to me about the rights that students have with respect to the freedom of speech, I would have found that fascinating. And so students can use this material as a gateway to thinking about these larger constitutional questions. This program brings students from New Haven schools to participate in mock oral argument about students constitutional rights, and that hands-on training is really remarkable.

One of the happiest days that I've had as a Professor at Yale Law School was when I went to Hill House, a school here in New Haven, and saw two Yale law students leading a class of about 25 public school students. And the students were just really enthusiastic about constitutional rights, and after class ended, one of the students said, when I grow up, I want to be a judge, and that was a really, really special day.

That's awesome. Well, I want to talk a little bit about another area where you're taking a domain-centered approach, and it's your new piece in Harvard Law Review, The Incoherence of Prison Law, which you wrote with Emma Kaufman who's one of ours. And it strikes me as if you were a matchmaker, you would pair the two of you to write that piece. Because it brings in both your backgrounds and distinctive scholarly sensibilities.

But the thing I love just the most about it is this arresting frame. So you start out by talking about how much time we spend in law and policy thinking about prisons. And so you write we ask who goes to prison.

We ask why prisons exist. We ask whether we could have a world without them. And yet, we completely neglect the law that shapes them, and that is just flatly true. and it's also just amazing to see you put meat

on the bones, and in particular foreground the stories of prisoners themselves, let them have a voice in these conversations. So I wonder if you could just walk us through the piece.
Yeah, sure. Let me tell you about the origins of the piece first. Emma and I taught a seminar in a prison called the Westville Correctional Facility, and we would go there 4, three hours, once a week, and talk about what the Constitution means with people who are incarcerated. And those students in that class really did shape how Emma and I think about the Constitution's meaning.
Some people who are outside would say, oh, these prisons are lawless institutions, and why would you be paying attention to constitutional law? And the students enrolled in that course really did drive home to us that law does shape their lives in significant ways within the prison. And so we in that piece, The Incoherence, were emphasizing the way that judges, too often, toggle back and forth between particular views of the prison, often to the detriment of protecting prisoners' constitutional rights.
For example, we talk about the notion of privacy in prison, and there's a Fourth Amendment case where the court takes a view that people who are incarcerated have no privacy rights whatsoever, that people who are incarcerated don't have any privacy rights in their cells. And then there's another case, where reporters want to access prison, and all of a sudden, the privacy rights of prisoners are really amplified, in saying these are not people in a zoo. Even though, of course, the people who were trying to gain access to the prison, the reporters, were trying to uncover the horrific conditions that exist in prison.
So that's just one example where the court toggles back and forth between notions of privacy to the detriment of prison. So we do in this piece try to take a panoramic look at prisoners' constitutional rights and demonstrate how the doctrine really doesn't hang together in a coherent way.
But what I loved about this was that I know it was in part built out in conversation with prisoners and your students in reading biographies and bringing in the voices of people who really generally aren't in legal conversations, except as the named plaintiff who's almost a cipher. In the piece, I wonder if you could just talk a little bit about how you brought those voices in.
Yeah, absolutely. I teach a seminar here called On the Inside, Narratives From Prison. And the focus on that seminar really is trying to hear from people who are impacted by the law in a direct way, unmediated, exactly as you say. When you read a case involving prisoner's rights, you hear from judges, you hear from wardens, you hear from correctional officers, but seldom do you hear from the people themselves. So we are trying to highlight those voices and talk about their views of law. So we read Wilbert Rideau's In the Place of Justice, who was in Angola, down in Louisiana. And when you hear from people who are incarcerated, they sometimes will say things that are quite surprising, at least to those who are on the outside. In the sense that Rideau really notes the important role that law has played in his estimation driving down violence in prison.
For a long time, judges were of the view that we should have what's been called a hands-off approach to prisons. Right? That we are judges, they would say. We are not wardens or correctional officers, and so we should just completely ignore this area. And finally, in the 1960s, courts started getting involved, and Rideau suggests that played an important role. So it seems to me that it would be the height of arrogance to ignore the views of the people who are most directly impacted by legal regimes.
Well, it's really wonderful to have this piece of the puzzle being built out here, because I think that sometimes, when I talk to 0L's, people who are applying to the law school, and they want to do criminal justice work, I want to not be too [INAUDIBLE] like, but also to say that this is the most amazing place you can imagine for doing criminal justice work. Because you're in a cohort of people who are looking in a 360

degree way about all of these cases. So I imagine just having a set of interlocutories that you do also helps push forward projects like these.

Absolutely. Having colleagues to push you on your ideas is incredibly important, and sometimes, that means at an incredibly abstract level, and that's there's real value in that. But people who know about the domain that you're in can really advance the conversation in a significant way as well, and there's a wonderful group of people who are interested in these topics here. This really is an unrivaled place to study criminal law in its many forms.

I want to talk about another one of your big pieces, and what I love about both your piece with Emma and this piece is that they're written with someone who's quite junior to you. And that is just emblematic of who you are, Justin. I want to talk about mentoring in a bit, but I know how much mentoring you do of young scholars.

So this one was written with a current student, and so I wonder if you could just talk a little bit-- this is a humdinger. This has got to be one of the biggest pieces that maybe you'll write in your career. I wonder if you could talk a little bit about your piece on rethinking Brown and communism.

Yeah. So I wrote a paper with a current student, here at Yale Law School, named Greg Bricker, a really wonderful student and collaborator. And the paper is called Brown and Red: Defending Jim Crow in Cold War America, and the dominant view is that the Supreme Court's decision in Brown was in some significant way driven by or giving voice to an anti-communist lens. That is to say that the Civil Rights movement was really anti-communist in nature, and we noticed from reading the writings of segregationists that they often styled themselves as being anti-communists. And so in fact, they said that getting rid of segregation would be to capitulate to Moscow, and so this was a core element of segregationist thought. And we thought that it would be valuable to recover the way that segregationists styled themselves in an effort to control the meaning of the Cold War.

After reading this article, I'm never going to teach Brown the way I did, because it was not just a scholarly consensus. It was almost thought to be scholarly fact, that Brown was in part a response to the pressures of the Cold War. And you've even made me want to teach footnote 11 differently. So footnote-- I realize that's a little in the weeds, but if you could talk a little bit about the famed footnote 11 and the story that you now tell about it.

The famed footnote 11, maybe even the infamous footnote 11. Right? Footnote 11 is where Chief Justice Warren cites the work of many social scientists, including Gunnar Myrdal and Kenneth Clark and the doll studies. And many people know this as the most infamous footnote in constitutional law, maybe the most inflammatory words in fine print, one scholar has said.

And it is a controversial footnote, but it seems to me that people fail to comprehend exactly why it was so controversial. Which is not only because it involved the work of social science, but also because, as segregationists at the time emphasized and argued, that it was the work of, they said, socialism and people who were drawn to communism. And so Gunnar Myrdal, this person they tried to tarnish with a socialist brush, said that this is the strong indication that Moscow was in the background here, and that is really driving the Supreme Court's decision making. So if you want to have a full understanding of what made footnote 11 so controversial, you need to examine it with the anti-communist lens.

One of the reasons I love this piece is because it's so reflective of the way I think you work as a scholar. It's such a deep scholarly move to engage with these materials and to take them seriously. And in a lot of ways, this piece reminded me of your piece on this other manifesto, which is one of my favorite pieces of

yours. I wonder if you could just say a little bit about that, because again, that was where there was a scholarly consensus, and you blew it up.

Yeah. I was writing a piece for a popular publication, and I wanted to cite a piece that was making a nakedly overt racist argument in just the most brazen terms possible.

And Justin, why don't you just start by telling us what this other manifesto is, for people who don't know.

Yeah. So the Southern Manifesto is a document that came out in March of 1956, about two years after Brown versus Board of Education. And just about all of the senators and congressmen from the former 11 states issued this statement that was about 1,000 words long, saying that Brown was wrongly decided. It was reprinted in newspapers all around the country and was understood to be a major statement of segregationist thought.

And so I went to the Southern Manifesto, and I was looking for this overt racist language that I just knew to be there. As it turns out, it did not say what I knew it said, and that is a sign that you might be on to an interesting project. Because the Southern Manifesto had this certain mystique, an ugly mystique around it, as being nakedly racist.

And it is a document-- make no mistake-- that is animated by racism, but the segregationists were sophisticated enough to be able to speak in multiple registers to multiple audiences. And the more that I dug into the piece, it was clear to me that they had stripped away some of the more overt arguments and made a highly legalistic argument, indeed. They use all six modalities of constitutional interpretation, when they are saying that Brown was incorrectly decided, and it seemed clear to me that, in fact, the real audience for the Southern Manifesto was not trying to whip up segregationist sentiment in the South, but instead to tamp down integrationist sentiment in the north.

One of the things that is distinctive about both your Southern Manifesto project and then the Jim Crow Brown and Red project is that, in each instance, you're taking a set of materials that deny your own humanity and engaging with them in a way that not many do. I wonder just, as a scholar but also as a human being, how do you think about that?

Yeah. I want to be very clear. I do not admire the architects of the Southern Manifesto or the anti-communism at the root of Brown and Red. Nevertheless, it is significant that these folks were incredibly astute lawyers. Senator Sam Ervin of North Carolina was a graduate of Harvard Law School, a justice on the North Carolina Supreme Court.

So we make a mistake when we ignore that work or think of it as being the product of these unsophisticated bumpkins who were jumping up and down and screaming never. And it's especially important, I think, to engage with this thought, because it's not merely some sort of antiquarian interest. Instead, if you pay attention to these arguments from the 1950s and 1960s, you can hear echoes of these arguments around us today.

Indeed, one of the cases that was decided when I was a law clerk at the Supreme Court, the Parents Involved case about Brown versus the Board of Education, and in fact, what it means in the modern day. There was a plurality opinion that was written by Chief Justice Roberts that really did echo strongly some of the arguments that Senator Sam Ervin made, in the 1960s, as he sought to offer a very constrained meaning of what Brown meant. So it seems to me that it is essential to engage with these odious arguments, but they are nevertheless worthy of paying attention to.

I find it very moving to see how your life is a human being and a scholar and a lawyer all connect in this work, and I wonder if I might move a little bit more to your life as a human being. You are one of the most

wonderful mentors we have at Yale Law School, and Justin, I don't know if you remember. When you sat down on the couch, the first time we were talking about the possibility of you coming, you said to me, I want to come to Yale Law School, because I want to mentor the students here. And just seeing you here in the mix, I see more of our students of color and first geners moving on to clerkships and to thinking about being an academic. It's just been wonderful.

I wonder if you might talk a little bit about, for students who look at scholars and see these incredible articles and think, oh, you just add water. These ideas just sprang from your head like Athena did from the head of Zeus in perfect form. Can you talk a little just about the process of writing? If that's too hard of question, we can--

No, no, no. One the things that I try to tell the many folks here who are interested in being a law professor is to not be in too big a rush to write or certainly to publish. And I tell a story about my own law school days, that ideas can get better, if you allow them to marinate over time. When I was a student in law school, I was thinking about writing a paper out of my personal life, in some respects.

It's a classic of contract law. So this is a case that is a classic of contract law. It's called the Williams versus Walker Thomas, case which deals with the doctrine of unconscionability, when is a contract so the term so uneven and disparate as to be unenforceable. Williams versus Walker Thomas grew out of Washington DC, my hometown, and it involved a woman who did not have much in the way of education, was on public assistance, had many children. And she entered into a contract with this store, and the terms were very uneven.

I remember thinking that I knew this part of town, in Washington DC, and I remember thinking that this was a Black woman. And the court, an opinion by a Judge J. Skelly Wright didn't note that this was a Black person, and I was thinking, well, should that matter in the analysis? What difference would it really make if this person were White or Black and what work would that do?

So for a while there I was thinking about doing a big inquiry into Williams versus Walker Thomas and the historical backdrop. And I have to say, that's not a very good idea for a paper. It's really small. Right? Nevertheless, it was an example of a broader phenomenon that is worthy of engagement. Which is when do courts note the racial identity of parties and litigants and other folks who they mention, and when do they not? So I subsequently wrote a paper called Recognizing Race that challenges-- or pardon me-- that really examines this area. And the court does it often, and it seems to me that they sometimes omit race, when it would be pertinent to the discussion at hand.

And conversely, sometimes insert race, when it is irrelevant and even has the tendency to entrench ugly racial stereotypes. And so I wrote that paper for lots of audiences, but including judges, to make them more perhaps conscious of when they are using race. So this is just one example of a broader phenomenon, and there can be real value in stepping back and trying to see things in a larger form. So I do firmly believe that law professors are made and not born.

Well, so on that note, Justin, I just want to say, if I can speak on a personal note, it is a rare thing to have the impact that you've had in your career, both in the world and just on real human beings and to write scholarship at the level that you're writing it. And I just got to say, as dean, you were the first person who came to the law school, when I was dean, and I could not be prouder of that fact, even though I had very little to do with it. But I just want to say how much of a joy it has been to be the dean at a law school where you are my colleague.

Thanks so much, Heather. I really enjoyed this conversation. I'm so glad to be here.

Thank you.
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